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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TERRY LYNN STINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

KENNETH W. STARR
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This brief is filed to bring to the attention of the Court a matter that occurred after the filing of our brief in opposition in this case.

On September 16, 1992, the United States Sentencing Commission published in the Federal Register a notice regarding revisions to the Sentencing Guidelines. 57 Fed. Reg. 42,804. One of the revisions that the Commission made was to Sentencing Guidelines § 1B1.10(d) (Policy Statement). That provision lists the amendments to the Sentencing Guidelines that can be given retroactive effect. The September 16, 1992, revision included the Commission's Amendment 433 among the amendments to the Guidelines that may be applied retroactively. As we explained in our brief in opposition

(at 10), Amendment 433 modifies the career offender Guidelines, §§ 4B1.1 and 4B1.2, under which petitioner was sentenced, by providing that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual App. C253, amend. 433 (Nov. 1991). The Commission stated that the revision to Sentencing Guidelines § 1B1.10(d) (Policy Statement) would take effect on November 1, 1992. 57 Fed. Reg. at 42,804. Under 18 U.S.C. 3582(c)(2) and Sentencing Guidelines § 1B1.10(a), a district court may reduce a defendant's term of imprisonment if the defendant was sentenced within a Sentencing Guidelines range that subsequently has been lowered and if the Commission has directed that the change be made retroactive. Accordingly, as of November 1, 1992, petitioner will be able to apply to the district court for resentencing to a sentence calculated on the basis of Amendment 433, i.e., without having his possession of a firearm treated as a "crime of violence" under the career offender Guideline. For this reason, as well, the petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1992

Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Westchester County Airport, White Plains, NY

Agency: Federal Aviation Administration (FAA), DOT.
Action: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before October 16, 1992.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Mr. Philip Brito, Manager New York Airports District Office, 181 South Franklin Avenue, room 305, Valley Stream, New York, 11581.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Eric B. Langeloh, Commissioner of Transportation of the County of Westchester, New York, at the following address: Department of Transportation, 112 East Post Road, White Plains, New York 10601.

Air carriers and foreign air carriers may submit copies of written comments previously provided to Westchester County under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Philip Brito, Manager of the New York Airports District Office, 181 South Franklin Avenue, room 305, Valley Stream, New York, 11581, Tel. (718) 553-18182. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On August 7, 1992, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Westchester County Department of Transportation was substantially complete within the

requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than November 5, 1992.

The following is a brief overview of the application.

Level of the proposed PFC: \$3.00.

Proposed charge effective date:

October 1, 1992.

Proposed charge expiration date:

September 30, 2023.

Total estimated PFC revenue:

\$29,483,000.

Brief description of proposed projects:

—Construct Crash Fire Rescue Training Facility.

—Construct Airport Perimeter Safety Road.

—Construct Parallel Taxiway System.

—Construct Heated Storage Facility.

—Construct General Aviation

Infrastructure.

—Acquire land for Airport Approach

Protection Zone.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: Air Charter Operators.

Any person may inspect the application in person at the FAA office listed above under "FOR FURTHER INFORMATION CONTACT" and at the FAA regional Airports office located at: Fitzgerald Federal Building, John F. Kennedy International Airport, Jamaica, New York, 11430.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Westchester County Airport.

Issued in Jamaica, New York State on August 27, 1992.

Louis P. DeRose,

Manager, Airports Division, Eastern Region.

[FR Doc. 92-22197 Filed 9-15-92; 9:45 am]

BILLING CODE 4910-13-01

UNITED STATES SENTENCING COMMISSION

Revisions to the Sentencing Guidelines for the United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding amendments to sentencing guidelines and policy statements effective November 1, 1992.

SUMMARY: The Sentencing Commission hereby gives notice of several actions taken pursuant to its authority under Section 217(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994

(a) and (u)). The Commission has reviewed amendments submitted to Congress on April 30, 1992, that may result in a lower guideline range and has designated one such amendment for inclusion in policy statement § 1B1.10 (Retroactivity of Amended Guideline Range). An earlier commentary amendment, (effective November 1, 1991), which the present amendment revises, was also designated for inclusion in § 1B1.10. In addition, the Commission has made a number of editorial, clarifying, and conforming amendments to the Guidelines Manual. **DATES:** The Commission has specified an effective date of November 1, 1992, for these actions.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Information Officer, Telephone: (202) 626-8300.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the U.S. Government. The Commission is empowered by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for Federal sentencing courts. Sections 994 (c) and (p) of Title 28, United States Code, further direct the Commission to periodically review and revise guidelines and policy statements previously promulgated, and require that guideline amendments be submitted to Congress for review. Absent action of the Congress to the contrary, guideline amendments become effective following 180 days of Congressional review on the date specified by the Commission (i.e., November 1, 1992). Unlike new guidelines and amendments thereto issued pursuant to 28 U.S.C. 994 (a) and (p), sentencing policy statements, commentary, and amendments thereto promulgated by the Commission are not required to be submitted to Congress for 180 days' review prior to their taking effect.

In connection with its ongoing review of the Guidelines Manual, the Commission continues to welcome comment on any aspect of the sentencing guidelines, policy statements, and official commentary. Comments should be sent to: The United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., suite 1400, Washington, DC 20004, Attn: Public Information Officer. Effective November 16, 1992, comments should be sent to: The United States Sentencing Commission, One Columbus Circle, NE., suite 2-500, Washington, DC 20002-8002, Attn: Public Information Officer.

Authority: Section 227(a) of the Comprehensive Crime Control Act of 1984 (28 U.S.C. 994(a)).

William W. Wilkins, Jr.,
Chairman.

Additional Revisions to the Guidelines Manual

(1) Section 1B1.10(d) is amended by deleting "and 380" and inserting in lieu thereof "380, 433, and 461".

This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. 994(u) in respect to guideline amendments that may be considered for retroactive application.

(2) Section 1B1.11 (Policy Statement) is amended in subsection (b)(1) by inserting "of conviction" immediately following "offense".

The commentary to § 1B1.11 captioned "Background" is amended in the first sentence by inserting "and policy statements" immediately following "guidelines".

This amendment clarifies the operation of this section.

(3) The commentary to § 2D1.1 captioned "Application Notes," as amended, is further amended in Note 10 in the "Drug Equivalency Tables" in the subdivision captioned "Cocaine and Other Schedule I and II Stimulants" by inserting the following additional entries:

"1 gm of Aminorex = 100 gm of marijuana
1 gm of Methcathinone = 380 gm of marijuana".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 10 in the "Drug Equivalency Tables" by inserting an asterisk immediately following each of the following subdivision captions: "Schedule I or II Opiates", "Cocaine and Other Schedule I or II Stimulants (and their immediate precursors)", and "LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)"; and by inserting the following additional sentence at the end of each of the above noted subdivisions:

"Provided, That the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12."

The Commentary to § 2D1.1 captioned "Application Notes," as amended is further amended by inserting the following additional note:

"15. Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 CFR 1308.13-15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is

classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 CFR 1308.13-15 is the appropriate classification."

This amendment adds equivalencies for two controlled substances to make the Drug Equivalency Tables more comprehensive, adds notes to the Drug Equivalency Tables to make clear the interaction between the minimum offense level for certain types of controlled substances in the Drug Quantity Table and the instructions for determining a combined offense level in a case with multiple controlled substances, and clarifies the treatment of certain pharmaceutical preparations that are classified as Schedule III, IV, or V substances under 21 CFR 1308.13-15.

(4) The commentary to § 2F1.1 captioned "Application Notes" is amended in Note 7 in the first paragraph by inserting the following additional sentence as the second sentence:

"As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred."

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 7(b) by deleting:

"In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan."

and inserting in lieu thereof:

"In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used."

This amendment clarifies that interest is not included in the determination of loss. In addition, it clarifies that in fraudulent loan application cases, as in other types of fraud, if the intended loss is greater than the actual loss, the intended loss is used. Finally, it makes

an editorial improvement in this commentary by deleting an unnecessary phrase.

(5) The Commentary to § 2K1.3 captioned "Application Notes" is amended by inserting the following additional note:

"11. As used in subsections (b)(3) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 8K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 15 by deleting "or (a)(5)" and inserting in lieu thereof "(a)(4)(B), or (a)(6)".

The Commentary to 2K2.1 captioned "Application Notes" is amended by inserting the following additional note:

"18. As used in subsections (b)(5) and (c)(1), 'another felony offense' and 'another offense' refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under § 8K2.6 (Weapons and Dangerous Instrumentalities) may be warranted."

This amendment clarifies the meaning of the terms "another felony offense" and "another offense," and corrects a clerical error.

(6) The Commentary to § 3C1.1 captioned "Application Notes" is amended by inserting the following additional note:

"7. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."

The Commentary to § 3C1.2 captioned "Application Notes," as amended, is further amended by renumbering Note 5 as Note 6 and by inserting the following additional note:

"5. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused."

This amendment clarifies the scope of the conduct for which the defendant is accountable under §§ 3C1.1 and 3C1.2.

(7) The Commentary to § 4A1.2 captioned "Application Notes" is

amended in Note 8 by deleting the last sentence as follows:

"If the government is able to show that a sentence imposed outside this time period is evidence of similar misconduct or the defendant's receipt of a substantial portion of income from criminal livelihood, the court may consider this information in determining whether to depart and sentence above the applicable guideline range."

and by inserting in lieu thereof:

"If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under § 4A1.3 (Adequacy of Criminal History Category)."

This amendment clarifies that dissimilar, serious prior offenses outside the applicable time period may be considered in determining whether an upward departure is warranted under § 4A1.3. The amendment provides additional Commission guidance on an issue that has produced conflicting decisions among the courts of appeals. Compare, e.g., *United States v. Leake*, 908 F.2d 550, 554 (9th Cir. 1990) (upward departure impermissible for remote prior convictions dissimilar to instant offense) and *United States v. Samuels*, 938 F.2d 210, 215 (D.C. Cir. 1991) (suggesting the same) with *United States v. Williams*, 910 F.2d 1574, 1579 (7th Cir. 1990), rev'd on other grounds, 112 S. Ct. 1112 (1992)

(although older prior crimes dissimilar to instant offense, upward departure permissible if convictions are reliable information of increased recidivism risk) and *United States v. Russell*, 905 F.2d 1439, 1444 (10th Cir. 1990) (same).

(8) The Commentary to § 7B1.1 captioned "Application Notes" is amended by deleting Notes 2 and 3 as follows:

"2. 'Crime of violence' has the same meaning as set forth in § 4B1.2(1), and includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

A crime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth in the violation charged involved use of explosives or, by its nature, presented a serious potential risk of physical injury to another. A crime of violence also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

3. 'Controlled substance offense' includes any offense under a federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense. A controlled substance offense also includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

and by inserting in lieu thereof:

"2. 'Crime of violence' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(1) and Application Notes 1 and 2 of the Commentary to § 4B1.2.

3. 'Controlled substance offense' is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(2) and Application Note 1 of the Commentary to § 4B1.2."

This amendment clarifies the Commission's intent that the terms "crime of violence" and "controlled substance offense" in § 7B1.1 have the same meaning as these terms have in § 4B1.2.

In addition, the Commission has updated the "Historical Notes" following the amended guideline sections, and has made a number of additional minor conforming and editorial revisions to improve the internal consistency and appearance of the Manual.

[FR Doc. 92-22332 Filed 9-15-92 8:45 am]

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